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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN HOLDEMAN,

Defendant and Appellant.

G044967

(Super. Ct. No. 09CF2226)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Christian Holdeman of three counts of second degree robbery (Pen. Code, § 211; all further statutory references are to this code) and one count of street terrorism (§ 186.22, subd. (a)). It also found true the allegation the robberies were committed for the benefit of a street gang. (§ 186.22, subd. (b).) Defendant was sentenced to 17 years, 4 months. He raises only one issue on appeal, the alleged insufficiency of the evidence that he actively participated in the gang. We affirm.

FACTS

At about 2 a.m. on the morning of September 5, 2009 four young men were driving in a car that ran out of gas in Santa Ana. Two of them, Michael Rubio and Jonathan Favila, left the car to go find gas and the other two remained in the car. While walking Rubio and Favila came across Orlando Santillan who agreed to show them to the nearest gas station. As they were walking an SUV pulled up next to them; inside were five or six Hispanic men between the ages of 19 and 23.

Either three or four of the men got out of the car, holding the waistbands of their pants as if they had guns. They told the three pedestrians not to look at them and to empty their pockets or they would get hurt. Favila turned over his wallet and cell phone after one of the men said, “Don’t make me fucking shoot you.” Another said to Rubio, “Give me what you got or I’ll crack your skull,” prompting Rubio to hand over his cell phone. One of them went through Santillan’s pockets and took his cell phone and iPod, plus a baseball cap. At some point the driver of the SUV “panicked” and urged his passengers to get back in; they then drove away.

The three victims then continued walking until they reached the gas station, at which point police were called and the SUV’s license plate number was provided. Shortly thereafter the police pulled over the SUV, ordering the occupants out. Defendant, the first to exit, came out of the driver’s door. Police found cell phones and an iPod in

the car. The victims identified Joe Guzman, Brendan Bui, and defendant as three of the men who robbed them. Two other men in the SUV were Arnold Franchesy and Gerardo Hernandez.

Santa Ana Police Officer Edward Zaragoza testified that in 2005 he interviewed defendant in connection with a probation check. Defendant told him he and some friends had formed a gang called Thug Life Familia or TLF in November 2004. Defendant's moniker was Scope.

According to the testimony of the gang expert, Eric Rivas, TLF started out as a tagging gang but by 2005 to 2006 it had become a criminal street gang, with approximately 15 to 20 members at the time of the robbery. It claimed a territory and had a common symbol. Its primary activities were auto theft, assault with a deadly weapon, and graffiti. The predicate crimes committed by two gang members in 2006 and 2007 were attempted murder and felony vandalism, respectively; both were convicted of street terrorism. The parties stipulated Bui, Guzman, Franchesy, and Hernandez, four men in the SUV with defendant, were active members of TLF on the day of the robbery.

Rivas's opinion was that defendant was also an active participant in the gang on that day. He had reviewed two STEP notices, one in 2005 when defendant and Guzman were arrested in a stolen car and another in 2009 in connection with the instant matter. He also looked at about 75 pictures for dates between January and April 2009 showing TLF graffiti with the name Scope included. Generally one tags one's own name, not another's.

After the prosecution presented a hypothetical questions, Rivas testified the robbery was committed to promote, further, and assist the gang's felonious conduct.

DISCUSSION

“‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] ‘This standard applies whether direct or circumstantial evidence is involved.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701, italics omitted.) It is not within our province to reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Section 186.22, subdivision (a) punishes a “person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” The offense has three elements: “Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, . . . ‘knowledge that [the gang’s] members engage in or have engaged in a pattern of criminal gang activity,’ and . . . ‘willful[] promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.’ [Citation.]” (*People v. Lamas* (2007) 42 Cal.4th 516, 523.) Defendant challenges only the first element, contending the evidence was insufficient to show his active participation in TLF once it became a criminal street gang.

Active participation under section 186.22 has been defined as “involvement with a criminal street gang that is more than nominal or passive” and occurs at or reasonably close to the time the crime was committed. (*People v. Castaneda* (2000) 23 Cal.4th 743, 747.)

The evidence here, while thin, is sufficient to satisfy that standard. Defendant admitted membership in TLF when it was a tagging gang. During that period he was arrested with Hernandez in a stolen vehicle. Defendant was in the company of Hernandez and three other TLF members during the robbery at issue here. This leads to a reasonable inference defendant had continued his association with TLF.

Further, police had numerous pictures for the first four months of 2009 showing TLF graffiti, including defendant’s moniker. The expert testified that where the graffiti shows a gang name and a moniker, the gang member sporting that moniker has painted the graffiti. The jury could infer from this defendant had created the graffiti despite the absence of direct evidence establishing it. One of TLF’s primary activities was graffiti is further evidence of defendant’s active participation.

Plaintiff relies on *People v. Castaneda, supra*, 23 Cal.4th 743 to argue the evidence is insufficient. In that case, which held the evidence did show the defendant was an active gang participant, the court listed several facts supporting its decision: police officers had seen the defendant with other members of his gang on several occasions and given him three STEP notices; the defendant had told police he was a member of the gang and he knew about its activities; and the robbery at issue was “typical” of the gang’s crimes and was committed in the gang’s claimed territory. (*Id.* at p. 746.) But there is nothing in *Castaneda* to suggest those facts are the exclusive proof of active participation in a gang.

And the absence of any of these facts does not prevent a finding of active participation. Thus, that the robbery occurred outside TLF’s claimed turf or was not one of the gang’s primary activities does not invalidate the judgment.

Defendant claims the basis of Rivas's opinion that he was an active participant in TLF was insufficient because the expert relied only on his review of police reports, including photographs of graffiti, and discussions with police and probation officers. But these are common, acceptable bases for an expert's opinion. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 944, 949 [gang expert's opinion based on police reports proper]; *People v. Williams* (2009) 170 Cal.App.4th 587, 622 [information from police officers proper basis for gang expert opinion].)

Further, the opinion is not rendered invalid because Rivas did not personally know or have contact with defendant or other members of TLF. By the very nature of his testimony Rivas was not called as percipient witness. And a gang officer cannot be expected to know every gang member in the County.

Likewise, that defendant contested the charges against him has no bearing on our decision. The jury found him guilty of the robbery and defendant did not appeal this finding. So whether he got out of the SUV or not or "panicked" when the robbery was occurring is irrelevant. "[I]f the circumstances reasonably justify the . . . findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

Defendant argues the jury instruction governing the gang enhancement (§ 186.22, subd. (b); CALCRIM No. 1401) allowed the jury to find he acted in association with the gang members based on Rivas's testimony to that effect, and that this would not be a finding of active participation. But the jury was also instructed as to the elements of section 186.22, subdivision (a), including the element defendant was an active gang participant. (CALCRIM No. 1400.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.